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No. 06-1407

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In The
Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

WILLIAM TERRY, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION PRISON,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

1.

Whether Petitioner can complain that no court has considered his "substantive actual innocence" claim, when he failed to present a "substantive actual innocence" claim in the federal habeas corpus court or on appeal to the Eleventh Circuit?

2.

Whether Petitioner can complain when the federal habeas corpus court conducts a "merits" review of Petitioner's constitutional claims without requiring the petitioner to meet the gateway inquiry of *Schlup v. Delo*, 513 U.S. 298 (1995)?

3.

Whether certiorari review is unwarranted in Petitioner's case, as the procedural history clearly demonstrates that Petitioner's assertion that the federal courts "ignored" his "actual innocence" claim is unfounded?

4.

Whether certiorari review in this case is unwarranted as it is clear that both the federal habeas corpus court and the Eleventh Circuit properly analyzed Petitioner's claims in light of *Schlup v. Delo*, 513 U.S. 298 (1995) and AEDPA principles?

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DENIAL OF SPECIFIC "FACTS" SET OUT IN THE PETITION

Respondent denies Petitioner's factual assertion that he has "compelling new evidence" of his "innocence" and that his post-trial affidavits "show that constitutional violations led to the conviction of an innocent man." (*See* Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 37-41).

Respondent also denies Petitioner's assertion that "no court has assessed the credibility of Mr. Davis' new evidence that underlies both his innocence and constitutional claims." (*See* Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

(a) Trial Proceedings in the Superior Court of Chatham County (1989-1991)

Petitioner, Troy Anthony Davis, was indicted in Chatham County, Georgia on November 15, 1989, for the murder of Officer Mark Allen McPhail, obstruction (against Officer Mark Allen McPhail), two counts of aggravated assault and possession of a firearm during the commission of a felony. At trial, conducted on August 19-30, 1991, Petitioner was represented by Robert Falligant and Robert Barker.

During opening statement, defense counsel Barker argued, "You're going to hear a story that is going to be

unbelievable. You are going to see a cast of characters that you will never have seen before, and they are unbelievable, and I mean that in any sense. They are just not worthy of belief." (T. 682.)[1]

Petitioner Davis testified in his own behalf at trial.[2] Petitioner admitted that he was at the scene of the shooting, but claimed he did not see who shot Officer McPhail because he was running away from the shooting and never looked back to see who did the shooting. (T. 1424; 1435). Petitioner specifically testified, "I heard the shot, but I didn't exactly see the shooting." (T. 1435).

As to Kevin McQueen, the jailhouse informant who testified that Petitioner admitted shooting Officer McPhail, Petitioner Davis claimed in his trial testimony that he did not know McQueen, that he had never made a statement to McQueen and that he was never in the same cell with McQueen. (T. 1459). Petitioner testified that he did not know Kevin McQueen personally and did not play basketball with McQueen. (T. 1431-1434). Petitioner Davis specifically denied ever telling McQueen that he killed the cop. (T. 1434).

Petitioner also denied that he shot Michael Cooper at the party in Cloverdale, which occurred the day before Officer McPhail's murder. In fact, Petitioner claimed that

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[1] T. 679-683. (The transcript of Petitioner's trial is contained in Respondent's Exhibit Nos. 15-21 filed in the federal habeas corpus court. References to the transcript of Petitioner's trial will be designated by "T.," followed by the appropriate page number. References to Respondent's Exhibit Nos. refer to the exhibits submitted in the district court.)

[2] T. 1415-1459.

he did not know Michael Cooper and saw him for the first time in the courtroom. (T. 1435).

Defense counsel for Petitioner presented the following five witnesses during the guilt-innocence phase of Petitioner's trial. Joseph Washington (T. 1339); Shelley Sams (T. 1352); Tonya P. Johnson (T. 1357); Jeffery Sams (T. 1372-1373) and Virginia Roberts Davis. (T. 1385).

Even during his trial, Petitioner claimed that Sylvester "Red" Coles was the murderer of Officer McPhail. Red Coles testified during Petitioner's trial and was extensively cross-examined by defense counsel.[3] (T. 899-974). However, Red Coles did not implicate Petitioner in the shooting of Officer McPhail, but merely stated that he and Petitioner were together when the shooting occurred. (T. 938-942). Red Coles testified he never saw Petitioner fire any shot that night and did not know who shot Officer McPhail. (T. 942).

During defense counsel's guilt phase closing argument,[4] defense counsel Robert Falligant argued:

> The first evidence and information they ever had in this case came from the mouth of the witness that the State put on the stand, and that was Sylvester Red Coles, the same individual who admitted having a gun, the same individual that numerous witnesses identified as having a gun that night, the same individual who admitted that he ran, he changed shirts, tried to conceal

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[3] The cross-examination of Red Coles appears on T. 919-951 of the guilt-phase transcript.

[4] Defense counsel's closing argument appears on pages 1506-1550 of the trial transcript.

his identity, the same individual who admitted he ran to a lawyer and turned himself in at four o'clock, but not to surrender for a crime, but to give the police the name of the person that they should be looking for.

And he gave them the name of Troy Anthony Davis, and from that point on, the entire focus of this investigation was not in deciding and finding the truth of this case as to who actually committed these crimes that the Defendant is now on trial for, but it was to find evidence to convict the Defendant of these crimes.

You see, at that point, the police knew, after talking to Sylvester Coles, that he, D.D. Collins, and the Defendant were on the lot that night. And yet what did the police do? They bought Mr. Coles' story hook, line, and sinker. They never considered Mr. Coles to be a suspect. They never considered Mr. Collins to be a suspect. What they considered them to be was witnesses.

They never questioned for one minutes (sic) the truth of what Sylvester Coles had to tell them. And then began this investigation. And they went out into this community, and they rounded up witnesses everywhere they could find them, and they paraded them in here, and Mr. Lawton talks about the overwhelming evidence in this case. We were overwhelmed by the number of witnesses in this case. But what about the quality, the credibility of those witnesses?

You, the jurors in this case are the sole judges of the credibility of those witnesses. . . . Seven witnesses put on that stand by the State of Georgia recanted, contradicted, or changed their testimony. . . . Many of those witnesses who came into

> this courtroom and changed their testimony and said, the first thing out of their mouth was, I'm not going to lie now. I want to tell the truth. . . . And let's talk about how those statements were taken. . . .

(T. 1507-1509).

Defense counsel also argued that there were "striking similarities in facial features" between Petitioner and Red Coles. (T. 1511). Later, defense counsel argued that Red Coles, not Petitioner, had the motive, means and opportunity to commit the murder. (T. 1518-1519).

As to jailhouse informant, Kevin McQueen, defense counsel argued, "Look at his record and see if you can attach any credibility to the story that he told" and "let's look at the story he told." (T. 1535-1536). Defense counsel again challenged McQueen's credibility by arguing, "I don't know why they even put a man like Kevin McQueen on the stand. The outrageous story that he concocted doesn't even begin to mesh, or it's not even similar to the incidents that occurred that night. But it was done to prejudice you." (T. 1537).

Finally, defense counsel argued, "This case is replete with reasonable doubt, and I submit to you that in your quest for the truth, what this case is all about, as you sift through this evidence and you review your notes about the consistencies, the prior inconsistent statements, the outright lies, the fabrications of the State's witnesses, if you reach the conclusion that the State has not carried its burden beyond a reasonable doubt, then as the Court will charge you, you'll be bound to acquit the Defendant." (T. 1549-1550).

On August 28, 1991, Petitioner was found guilty of one count of malice murder, one count of obstruction of a law enforcement officer, two counts of aggravated assault and one count of possession of firearm during the commission of a felony.

Petitioner Davis also testified during the sentencing phase of his trial. (Sentencing phase transcript, p. 52-67.)[5] Petitioner Davis asked the jury to spare his life, saying that "at the present time you've found me guilty of some offenses that I did not even commit." (T. 65). Defense counsel argued during sentencing phase closing argument that, "I know you've convicted Troy, and we have to accept that decision you've made. I know you've convicted him beyond a reasonable doubt. If in your mind there's certain little nagging lingering doubts, I hope you'll consider those today." (Sentencing phase transcript, p. 80).

Following the penalty phase, Petitioner was sentenced to death for the murder of Officer McPhail on August 30, 1991.

(b) Motion for New Trial Proceedings (1991-1992)

On September 12, 1991, the trial court appointed Petitioner's trial attorneys, Mr. Falligant and Mr. Barker, to represent Petitioner on appeal and appointed another attorney, Mr. C. Jackson Burch, to represent Petitioner specifically as to any issue of ineffective assistance of counsel which Petitioner might want to raise.

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[5] The transcript of the sentencing phase was Respondent's Exhibit No. 21 in the district court.

On October 1, 1991, Petitioner's original trial attorneys, Falligant and Barker, filed a motion for new trial on Petitioner's behalf, raising three grounds. On December 2, 1991, the trial court scheduled "the hearing on any potential ineffective assistance of counsel claims to immediately follow Defendant's hearing on his motion for new trial."

Mr. Falligant and Mr. Barker filed an amended motion for new trial, raising 26 grounds on February 14, 1992 and the hearing on this motion was held on February 18, 1992. Following Mr. Barker's presentation and argument of certain issues raised in the amended motion for new trial, co-counsel, Mr. Falligant, argued various additional portions of the amended motion for new trial and requested briefing on those issues. (MNT 11-22).[6]

Following the portion of the hearing on the motion for new trial conducted by trial counsel, Mr. Burch presented the portion of the hearing raising claims of trial counsel ineffectiveness. (MNT 25-42). Petitioner's lead trial counsel, Mr. Falligant, appeared and testified at this hearing. (MNT 33-40).

Immediately following this hearing, Mr. Burch filed an "Amendment to Motion for New Trial as to Ineffective Assistance of Trial Counsel," raising 16 different grounds of ineffective assistance of trial counsel. On February 28, 1992, Mr. Falligant and Mr. Barker filed an amendment to the amended motion for new trial, asserting an additional

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[6] References to the transcript of the February 18, 1992 motion for new trial hearing will hereinafter be designated by "MNT" followed by the appropriate page number. The transcript of Petitioner's motion for new trial was submitted as Respondent's Exhibit No. 22 in the district court.

ground. On March 12, 1992, the trial court denied Petitioner's ineffective assistance of counsel claim and also denied Petitioner's motion for new trial, as amended, on March 16, 1992.

(c) Consolidated Direct Appeal to the Georgia Supreme Court (1992-1993)

On appeal to the Georgia Supreme Court, the Court noted it was consolidating Petitioner's two appeals before the Court. *See Davis v. State*, 263 Ga. 5 (1993).

Petitioner's convictions and death sentence were unanimously affirmed by the Georgia Supreme Court in the consolidated appeal in *Davis v. State*, 263 Ga. 5 (1993).

In its decision, the Georgia Supreme Court summarized the facts presented at Petitioner's trial as follows:

> At midnight, on August 18, 1989, the victim, a police officer, reported for work as a security guard at the Greyhound Bus Station in Savannah, adjacent to a fast food restaurant. As the restaurant was closing, a fight broke out in which Davis struck a man with a pistol. The victim, wearing his police uniform – including badge, shoulder patches, gun belt, .38 revolver, and night stick – ran to the scene of the disturbance. Davis fled. When the victim ordered him to halt, Davis turned around and shot the victim. The victim fell to the ground. Davis, smiling, walked up to the stricken officer and shot him several more times. The officer's gun was still in his holster.
>
> The victim wore a bullet-proof vest, but the vest did not cover his sides and the fatal bullet entered the left side of his chest and penetrated his

> left lung and aorta, and came to rest at the back of his chest cavity. The officer was also shot in the left cheek and the right leg.
>
> The next afternoon, Davis told a friend that he had been involved in an argument at the restaurant the previous evening and struck someone with a gun. He told the friend that when a police officer ran up, Davis shot him and that he went to the officer and "finished the job" because he knew the officer got a good look at his face when he shot him the first time.
>
> After his arrest, Davis told a cellmate a similar story.

Davis v. State, 263 Ga. 5, 6 (1993).

The Georgia Supreme Court also specifically found that the evidence presented at trial was sufficient to support the verdict, by stating that, "The evidence supports the conviction on all counts. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979)." *Davis v. State*, 263 Ga. 5, 7 (1993).

The Georgia Supreme Court also rejected the claims of ineffective assistance of counsel which had been raised in Petitioner's motion for new trial. *Davis v. State*, 263 Ga. 5, 10 (1993).

Petitioner's petition for a writ of certiorari was denied by this Court in *Davis v. Georgia*, 510 U.S. 950 (1993).

(d) State Habeas Corpus Proceedings (1994-1997)

On March 15, 1994, the Georgia Appellate Practice and Educational Resource Center, Inc. filed a habeas

corpus petition. On August 28, 1995, counsel for Petitioner filed a notice of withdrawal of named counsel and motion to continue, or alternatively, motion to withdraw, in the Butts County Superior Court and filed a supplemental motion to continue on October 13, 1995. On October 19, 1995, these motions were denied.

On November 13, 1995, Petitioner filed a petition for immediate review of the order denying continuance in the Georgia Supreme Court. The Georgia Supreme Court granted the petition for immediate review and on May 28, 1996, concluded that the habeas corpus court abused its discretion in denying Petitioner a continuance. *Davis v. Thomas*, 266 Ga. 835, 471 S.E.2d 202 (1996).

Petitioner filed a 79-page amendment to his state habeas corpus petition, raising 15 claims for relief, on November 6, 1996. During the state habeas corpus evidentiary hearing held on December 16, 1996, all four of Petitioner's trial counsel testified and Petitioner presented 33 affidavits. During this hearing, Petitioner was not restricted in the type of evidence that he could present.

During the state habeas corpus hearing, Petitioner's lead trial attorney, Robert Falligant, testified that the real issue at trial was:

> whether or not he [Davis], in fact, was the person who committed the crimes. And, quite frankly, based on the information that we had and the evidence I had, it appeared it was a very good likelihood that Sylvester Coles, also known as Red, was the one who actually killed Officer McPhail and shot, well not so much shot Michael Cooper, but the main issue in my case was the death of Office McPhail, and basically that is the

> emphasis we put on the investigation and what we were looking for.

(State habeas corpus transcript, volume 1, pp. 125-126).[7]

Mr. Falligant also testified concerning trial counsels' investigation of the case, by stating, "there is no way to say how many people we talked to. This case, there were so many rumors and so much talk on the street. We extensively investigated the case." (State habeas corpus transcript, p. 183). "We hired, we got funds for an investigator." (State habeas corpus transcript., pp. 183-184). Mr. Falligant further testified, "we really felt it was a very defendable case, but we just, you know, obviously, ran into a lot of dead ends, as you frequently do in these type of cases." (State habeas corpus transcript, p. 184).

Appellate/motion for new trial counsel Burch also testified at the state habeas corpus hearing that he believed trial counsel's investigation was reasonable, but he also investigated every lead that came to him regardless of whether it related to the guilt or innocence of the Petitioner. (State habeas corpus transcript, pp. 237, 222-223).

The state habeas corpus court denied Petitioner relief on September 9, 1997. In denying Petitioner relief, the state habeas corpus court found the following:

> from a review of the record that many pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies in the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during

[7] The transcript of Petitioner's state habeas corpus hearing was Respondent's Exhibit Nos. 59-62 in the federal habeas corpus court.

> Davis' trial. (cite omitted) The jury, in its rightful role as finder of fact during the trial, was responsible for evaluating the credibility of the witnesses and determining whether the state proved beyond a reasonable doubt that Davis shot and killed Officer McPhail. **This court, although acting now as the finder of fact in this habeas proceeding, cannot supplant the role of the jury** and find based on its own review of the record that the jury *should* have concluded that the state did not carry its burden at Davis' trial. The core purpose of the writ of habeas corpus would not be served by such a presumptuous usurpation of the jury's deliberative process. This court is limited to evaluating whether Davis' rights were properly protected in the context of his jury trial.

(State habeas corpus order of September 5, 1997, p. 41) (emphasis supplied).

The state habeas corpus court denied relief by finding all of Petitioner's claims "are procedurally barred by having been raised and litigated at trial and on appeal or by having been waived, with the exception of the claim that his attorneys provided ineffective assistance at the motion for new trial and appellate stages." (Respondent's Exhibit No. 69 in the district court, p. 43).

Petitioner appealed to the Supreme Court of Georgia from the denial of state habeas corpus relief. Petitioner filed a notice of appeal on September 25, 1997 and an application for a certificate of probable cause to appeal on December 10, 1997.

(e) Appeal to the Georgia Supreme Court from the Denial of State Habeas Corpus Relief (1997-2000)

On February 24, 2000, the Georgia Supreme Court granted Petitioner's application for certificate of probable cause to appeal from the denial of state habeas corpus relief and asked the parties to address four specific questions: (1) whether execution by electrocution constituted cruel and unusual punishment under our Federal and State Constitutions; (2) whether imposition of the death penalty in this case was disproportionate to the penalty imposed in other similar cases in Georgia; (3) whether Petitioner's appellate counsel operated under a conflict of interest; and (4) whether Petitioner's absence during critical stages of his trial violated his rights under our Federal and State Constitutions.

The Georgia Supreme Court affirmed the denial of state habeas corpus relief on November 13, 2000, in *Davis v. Turpin*, 273 Ga. 244 (2000), and denied Petitioner's motion for reconsideration on December 15, 2000. On May 14, 2001, Petitioner filed a petition for a writ of certiorari in this Court which was denied on October 1, 2001.

(f) Federal Habeas Corpus Proceedings (2001-2004)

Petitioner filed his application for federal habeas corpus relief in the U. S. District Court for the Southern District of Georgia, Savannah Division, on December 14, 2001. Respondent's answer was filed on February 11, 2002. Petitioner's motion for discovery was denied on September 19, 2002.

Petitioner's motion for an evidentiary hearing was denied on March 10, 2003. The order denying Petitioner's motion for an evidentiary hearing contradicts Petitioner's

assertion in his petition for certiorari that the federal habeas court did not consider his post-trial affidavits. In the order denying Petitioner's motion for an evidentiary hearing, the federal habeas corpus court extensively reviewed each affidavit proffered during the state habeas corpus proceedings and where applicable, compared the affiant's testimony to any testimony which was given during Petitioner's trial, as well as whether the affiant had previously provided an affidavit. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).[8]

In reviewing Petitioner's evidentiary hearing request, the federal habeas court scrutinized these affidavits, both to determine if they could have been submitted during state habeas corpus proceedings (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 40) and also, to determine if the presentation of these affidavits would undermine the court's confidence in the outcome of the proceeding.[9] (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 40-41).

The federal habeas court expressly stated that it would consider all of the affidavits and material admitted during state habeas corpus proceedings, but would not permit Petitioner to re-offer these affidavits during a

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[8] As the federal habeas court noted, with the exception of attorney testimony, all of the "actual innocence" testimony offered by Petitioner during state habeas corpus proceedings, was in affidavit form. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 39).

[9] In fact, the federal habeas corpus specifically examined each affidavit offered by Petitioner. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).

federal evidentiary hearing. Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 41).

Also contrary to Petitioner's current contention, the federal habeas court reviewed the trial testimony, including Petitioner's testimony, the evidence presented during state habeas corpus proceedings and found that even after Petitioner had been given a full opportunity to present any evidence in support of his "actual innocence" claim he had failed to establish that he was "factually innocent." (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22; 37-41).

The federal habeas court examined the post-trial affidavits relied upon by Petitioner, which he asserts have never been "examined" and the federal habeas court held that, "the Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim." (Federal Habeas Court Order of 5/13/04, denying relief, p. 25).

The federal habeas corpus court denied Petitioner relief on May 13, 2004. Petitioner's motion to amend the judgment filed on May 13, 2004, was denied on June 3, 2004.

(g) Appeal to the Eleventh Circuit Court of Appeals (2004-2006)

Although the district court denied Petitioner's application for a certificate of appealability on July 20, 2004, the Eleventh Circuit granted Petitioner's application on September 15, 2004.

Following briefing and oral argument, the Eleventh Circuit began its examination of Petitioner's appeal from the denial of federal habeas corpus relief by noting that, "In this case, Davis does not make a substantive claim of actual innocence." *Davis v. Terry*, 465 F.3d 1249, 1251 (11th Cir. 2006).

The Eleventh Circuit proceeded to find that Petitioner "concedes" that all of his claims for relief are procedurally defaulted and that the federal habeas court actually considered the "merits" of Petitioner's constitutional claims, but nevertheless, "rejected them as a matter of law." *Davis v. Terry*, 465 F.3d 1249, 1252 (11th Cir. 2006).

The Eleventh Circuit rejected the claim which is the basis of this petition for certiorari, i.e., that the federal habeas court used the wrong test in determining that it would review the "merits" of Petitioner's procedurally defaulted claims. *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006).

The Eleventh Circuit concluded that Petitioner "cannot be heard to complain that the test for achieving a desired result was not applied, or not applied correctly, when the desired result was, in fact, obtained." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006).

Then, having reviewed the federal habeas corpus court's rejection of Petitioner's claims after reviewing these claims on "the merits," the Eleventh Circuit concluded that, "we cannot say that the district court erred in concluding that Davis has not borne his burden to establish a viable claim that his trial was constitutionally

unfair." *Davis v. Terry*, 465 F.3d 1249, 1256 (11th Cir. 2006).

PART TWO

STATEMENT OF THE FACTS

At approximately 1:00 a.m. on Saturday, August 19, 1989, Officer David Owens, of the Savannah Police Department, responded to a call of "an officer down" at the Greyhound bus station on Oglethorpe Avenue. (T. 759)[10]. Officer Owens found the victim, Mark McPhail, a 27-year-old Savannah police officer, lying face down in the parking lot of the Burger King restaurant next to the bus station. (T. 759). Officer McPhail's mouth was filled with blood and bits of his teeth were on the sidewalk. As he began administering CPR to the victim, Officer Owens noticed that the victim's firearm was still snapped into his holster. (T. 761).

Larry Young, who was present at the scene, told police that between midnight and 1:00 a.m. he had walked from the Burger King parking lot, which was frequented by transients and homeless individuals, to the convenience store down the block to purchase beer. (T. 797-798). Sylvester "Red" Coles saw Young leave the pool hall next door and began following Young demanding a beer. (T. 798). Coles continued to harass Mr. Young all the way back to the Burger King. (T. 799). When Young arrived at the parking lot, Harriet Murray and two unidentified men were sitting on a low wall by the restaurant. Petitioner, Troy Anthony Davis, and Daryl Collins, who had taken a shortcut to the parking lot, came

[10] References to the transcript of Petitioner's trial will be designated by "T.," followed by the appropriate page number.

out from behind the bank and surrounded Mr. Young. (T. 799). Mr. Coles, who was facing Mr. Young, told him not to walk away "cause you don't know me, I'll shoot you," and begin digging in his pants. (T. 845). The two men seated on the wall fled, and Ms. Murray ran to the back door of the Burger King, which was locked. (T. 799). Petitioner, who was behind Young and to his right, blindsighted him, striking him on the side of the face with a snub-nosed pistol, inflicting a severe head injury which formed the basis of Count III of the indictment. Mr. Young began to bleed profusely, and he stumbled to a van parked in front of the Burger King drive-in window, asking the occupants for help. (T. 803). When the driver did not respond, Petitioner went to the drive-in window, but the manager shut it in his face. (T. 803, 915).

In response to the disturbance in the parking lot, Officer McPhail, who was working as a security guard at the restaurant, walked rapidly from behind the bus station, with his nightstick in his hand and ordered the three men to halt. (T. 849). Mr. Collins and Petitioner fled, and Officer McPhail ran past Sylvester Coles in pursuit of Petitioner. (T. 851). Petitioner looked over his shoulder, and when the officer was five to six feet away, shot him. Officer McPhail fell to the ground, and Petitioner walked towards him and shot him again while he was on the ground. (T. 850). One eyewitness testified that Petitioner was smiling at the time. (T. 851). The victim died of gunshot wounds before help arrived.

Thirty minutes after the killing, Red Coles appeared at his sister's house a few blocks from the bus station. Mr. Coles asked his sister for another shirt. (T. 915). Shortly thereafter, Petitioner appeared and asked Mr. Coles for the yellow t-shirt Coles had been wearing. After he changed his shirt, Petitioner left. (T. 915). Petitioner fled

to Atlanta the following day and surrendered to authorities on August 23, 1989.

Pursuant to their investigation, police learned that on the night prior to the killing, Petitioner had attended a party on Cloverdale Drive in a subdivision near Savannah. (T. 1115-1116). During the party, Petitioner, annoyed that some girls ignored him, told several of his friends something about "burning them." (T. 146). Petitioner then walked around saying, "I feel like doing something, anything." (T. 1464). When Michael Cooper and his friends were leaving the party, Petitioner was standing out front. (T. 1120). Michael Cooper was in the front passenger seat, and as the car pulled away, several of the men in the car leaned out the window shouting and throwing things. (T. 1120, 1186). Petitioner shot at the car from a couple of hundred feet away and the bullet shattered the back windshield and lodged in Michael Cooper's right jaw. (T. 1186). Cooper was treated at the hospital and released and Cooper's injury formed the basis for Count IV of Appellant's indictment. The shooting incident took place approximately one hour before Officer McPhail was shot.

Shortly after Michael Cooper was shot, Eric Ellison and D.D. Collins picked up Petitioner in Cloverdale and took him to Brown's pool hall in Savannah. Red Coles, wearing a yellow t-shirt, was already at the pool hall.

An autopsy revealed that Officer McPhail was shot twice. One bullet entered the corner of his cheekbone on the left side and exited the back of his neck; the bullet blew away bits of his teeth, and his lip was impaled on his teeth. (T. 782-784). The second bullet passed through the armhole of McPhail's bullet-proof vest, and entered his chest on the left side. (T. 784). This bullet pierced the lung and the

aorta, and lodged in the opposite side between the third and fourth vertebrae, at the back of the chest cavity near the spinal column. (T. 784-787). The cause of the victim's death was a loss of blood from a gunshot wound to the left side of his chest. (T. 789). The pathologist further noted that there were scrapes and lacerations on the victim's arms and legs, and an apparent injury to his right thigh, which could have been grazed by a bullet. (T. 788-789).

A ballistics expert testified that the bullet that wounded Michael Cooper could have been fired from a .38 special revolver or a .357 magnum. (T. 1291). The bullet from McPhail's body was of the same type and was possibly fired from the same weapon as used in the Cooper shooting. (T. 1292). Four .38 special casings recovered at Cloverdale where Michael Cooper was wounded, were fired from the same gun as casings found at the scene of Officer McPhail's murder. (T. 1292).

At trial, Kevin McQueen, who was at the Chatham City jail with Petitioner, testified that Petitioner told him there had been a party in Cloverdale on the night prior to the victim's murder; Petitioner had argued with some boys and there was an exchange of gunfire. (T. 1230-1231). Petitioner told McQueen he did some of the shooting. (T. 1231). After the party, Petitioner went to a girlfriend's house and intended to eat breakfast at Burger King. Petitioner stated that he was with a friend and they ran into a guy who "owed money to buy dope." (T. 1231). There was a fight, Officer McPhail appeared, and Petitioner shot him in the face. As Officer McPhail attempted to get up, Petitioner shot him again, because he was afraid McPhail had seen him that night at Cloverdale. (T. 1232). Petitioner also told McQueen that he was on his way out of town to Atlanta. (T. 1232).

Jeffrey Lapp testified that Petitioner told him he did the shooting at Burger King, but that it was self-defense. (T. 1249-1252). Mr. Lapp noted that Petitioner's street name was RAH, standing for "Rough As Hell." (T. 1257).

Red Coles identified Petitioner as the perpetrator of Officer McPhail's murder, as did numerous other eyewitnesses, including Harriet Murray, Dorothy Ferrell, Daryl Collins, Antoine Williams, Steven Sanders and Larry Young.

Petitioner testified at trial. Petitioner admitted that he was present at the scene of the shooting on the night in question, but denied that he was involved in the shooting of Cooper or the victim or the assault on Larry Young.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE FACT-SPECIFIC APPLICATION OF THIS COURT'S DECISION IN *SCHLUP V. DELO*, 513 U.S. 298 (1995), WHICH RESULTED IN PETITIONER'S SUBSTANTIVE CLAIMS FOR RELIEF BEING REVIEWED BY THE FEDERAL COURTS, PRESENTS NO ISSUE WARRANTING THIS COURT'S EXERCISE OF ITS CERTIORARI JURISDICTION.

A. Petitioner cannot complain that no court has considered his "substantive actual innocence" claim, when the Eleventh Circuit expressly stated that Petitioner "does not make a substantive claim of actual innocence."

Petitioner's initial assertion in his "question presented" that "no court has examined Petitioner Troy Davis' compelling new evidence to determine if he is innocent," stands in stark contrast to the Eleventh Circuit's unequivocal

statement that, "In this case, Davis does not make a substantive claim of actual innocence." *Davis v. Terry*, 465 F.3d 1249, 1251 (11th Cir. 2006).

Therefore, assuming *arguendo*, that Petitioner is now raising a substantive actual innocence claim, there is no factual predicate for his assertion that the lower courts refused to consider a substantive "actual innocence" claim which Petitioner failed to raise in those proceedings.

This Court has stated in such cases as *Kentucky v. Stincer*, 482 U.S. 730, 747 (1987), citing *Heckler v. Campbell*, 461 U.S. 458, 468-469, n. 12 (1983), that it will not consider grounds which were not presented to the court below, except "in exceptional cases." An examination of the procedural history of Petitioner's case clearly establishes that Petitioner had every opportunity to allege a substantive actual innocence claim, but chose instead to rely on an assertion of "actual innocence" to attempt to excuse his procedural default of various constitutional claims for relief. Therefore, assuming, but in no way conceding, that Petitioner is now raising a substantive "actual innocence" claim, Petitioner has presented no "exceptional" circumstances which would authorize this Court to review a substantive "actual innocence" claim when such a claim was not presented to the federal habeas corpus court, or to the Eleventh Circuit Court of Appeals.

This Court should decline to grant certiorari as to any substantive "actual innocence" claim being raised for the first time in the instant petition for a writ of certiorari.

B. The federal courts applied this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995), in a manner benefiting Petitioner and their fact-specific application of *Schlup* presents no issue warranting review by this Court.

Petitioner claims that the federal habeas corpus court, "skipped" the innocence gateway inquiry of *Schlup v. Delo*, 513 U.S. 298 (1995), allegedly to "avoid its role as fact finder" in what Petitioner asserts is a "substantial innocence" case. However, as just noted, Petitioner did not raise a substantive innocence claim in the lower courts, but rather attempted to excuse his procedural default of his constitutional claims by making the required "innocence" showing.

In affirming the denial of federal habeas corpus relief to Petitioner, the Eleventh Circuit noted that Petitioner contended "that his constitutional claims of an unfair trial must be considered, even though they are otherwise procedurally defaulted, because he has made the requisite showing of actual innocence under *Schlup*." *Davis v. Terry*, 465 F.3d 1249, 1252 (11th Cir. 2006).[11] *See also*, order of the federal habeas corpus court of 5/13/04, p. 65 (finding that "the state habeas court's reading of this claim as an argument made to support application of the miscarriage of justice exception was a fair assessment of Petitioner's position".)

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[11] Schlup, like Petitioner, raised an "actual innocence" claim, in an attempt to obtain review of an ineffective assistance claim and a *Brady* claim. *Schlup v. Delo*, 513 U.S. 298, 315 (1995). Both Schlup and Petitioner, attempted to meet the miscarriage of justice standard by establishing "actual innocence," as they were unable to establish the requisite cause and prejudice.

In the decision of the federal habeas corpus court reviewed on appeal by the Eleventh Circuit, the habeas court clearly relied on this Court's decision in *Schlup* in reviewing Petitioner's "actual innocence" claim. The federal habeas corpus court applied *Schlup* by concluding as follows:

> As explained above, a federal court looks, under the miscarriage of justice exception, to colorable claims of actual innocence for "*permission*" to address questions of constitutional impropriety asserted in procedurally defaulted claims. *See Schlup*, 513 U.S. at 315-16; *see also Brown*, 229 F. Supp. 2d at 1362. If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" gateway need not be implemented. *See Schlup*, 513 U.S. at 316. Ultimately, the state habeas court's analysis serves as assurance that no constitutional deficiencies exist in this case so as to merit habeas corpus relief.

(Federal Habeas Court Order of 5/13/04, denying relief, p. 65).

Contrary to Petitioner's contention, it is apparent from the specific language of the federal habeas corpus court's opinion, that the federal habeas corpus court clearly acknowledged the gateway provision of *Schlup v. Delo*. However, having made that acknowledgement of *Schlup*'s gateway function, the federal habeas court chose to rely on the provision of *Schlup* which expressly permits bypassing the gateway provision, if the reviewing court is "satisfied that no constitutional error occurred." *See Schlup v. Delo*, 513 U.S. at 316.

As properly found by the Eleventh Circuit, Petitioner did not identify a fatal flaw in the federal habeas court's *Schlup* analysis. In fact, an examination of the federal habeas court's opinion demonstrates that the federal habeas court went further than *Schlup* requires in analyzing Petitioner's claims, in light of Petitioner's failure to make a colorable showing of innocence. The federal habeas court simply assumed that the requisite colorable showing of innocence had been made and reviewed the "merits" of the constitutional claims raised by Petitioner, even though the state habeas corpus court had found the claims to be procedurally defaulted.[12]

The Eleventh Circuit also properly applied *Schlup* in rejecting Petitioner's claim that the federal habeas corpus court had "erred in declining to consider evidence of his actual innocence and instead, reached the merits of his constitutional claims." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006).

The Eleventh Circuit found that it was essentially irrelevant whether the federal habeas court had improperly declined to utilize *Schlup*'s gateway provision to obtain review of his constitutional claims, as the federal habeas court had proceeded to conduct a "merits" review of Petitioner's procedurally defaulted constitutional claims. The Eleventh Circuit properly found the following:

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[12] The state habeas corpus court denied relief by finding all of Petitioner's claims "are procedurally barred by having been raised and litigated at trial and on appeal or by having been waived, with the exception of the claim that his attorneys provided ineffective assistance at the motion for new trial and appellate stages." (State habeas corpus court denying relief, p. 43).

> As noted above, the procedural claim of actual innocence under *Schlup* is permitted in order to assure consideration of constitutional claims of an unfair trial where those claims have been procedurally defaulted. Davis received precisely such substantive consideration. *He cannot be heard to complain that the test for achieving a desired result was not applied, or not applied correctly, when the desired result was, in fact, obtained.*

Davis v. Terry, 465 F.3d 1249, 1253 (11th Cir. 2006) (emphasis supplied).

Petitioner obtained the desired "merits" review of his claims, and has no basis for criticizing the manner in which the federal habeas court determined that such a substantive review of the claims would be made. Thus, there is no case or controversy to be resolved by this Court, as the Eleventh Circuit properly found that the federal habeas corpus court reviewed Petitioner's "actual innocence" claims pursuant to *Schlup* and Petitioner received the substantive review of his procedurally defaulted claims which he sought to obtain by alleging "actual innocence."

The lack of the availability of further relief to this Petitioner is demonstrated by the fact that if a reviewing court should find that the gateway provision of *Schlup* was not properly utilized by the federal habeas corpus court in Petitioner's case, the only relief which Petitioner could obtain would be to receive a review of his constitutional claims on their merits, which is exactly the same review which was conducted by the federal habeas corpus court.

Additionally, Petitioner's allegation that "no court has examined Petitioner Troy Davis' compelling new evidence

to determine if he is innocent," is belied by the clear language of various orders of the federal habeas court. In an order denying Petitioner's motion for an evidentiary hearing, the federal habeas corpus court extensively reviewed each affidavit proffered during the state habeas corpus proceedings and where applicable, compared the affiant's testimony to any testimony which was given during Petitioner's trial, as well as whether the affiant had previously provided an affidavit. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).[13]

The federal habeas court examined the post-trial affidavits relied upon by Petitioner, which he asserts have never been "examined" and held the following: "the Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim." (Federal Habeas Court Order of 5/13/04, denying relief, p. 25).

C. This case does not constitute the proper vehicle to revisit *Schlup*'s "gateway" provisions.

Assuming that this Court decides to revisit *Schlup*, this case does not represent the proper vehicle for reviewing *Schlup*'s gateway provision, as the gateway provision was not utilized by the federal courts to authorize a substantive review of Petitioner's procedurally defaulted

[13] As the federal habeas court noted, with the exception of attorney testimony, all of the "actual innocence" testimony offered by Petitioner during state habeas corpus proceedings was in affidavit form. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 39).

claims. As already noted, this Court in *Schlup*, specifically authorized bypassing the gateway provision if the reviewing court found that, "If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" gateway need not be implemented." *Schlup*, 513 U.S. at 316.

Petitioner's case constitutes a fact-specific application of *Schlup*, where Petitioner is not alleging a substantive "actual innocence" claim, but is merely asserting innocence as a means to obtain a substantive review of other claims. *Schlup*'s provisions were properly applied by the federal habeas corpus court in light of Petitioner's allegations and post-trial affidavits.[14]

The fact that *Schlup*'s gateway provisions might be applied differently in future cases in which a petitioner may be alleging substantive actual innocence claims, is mere speculation and does not bear on the instant case before the Court nor warrant this Court's exercise of its certiorari jurisdiction.[15] *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) ("The legal problem must be "beyond the academic or the episodic.")

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[14] Insofar as Petitioner's petition for certiorari represents Petitioner's disagreement with the federal habeas court's review of his post-trial affidavits as not presenting "compelling evidence" of his innocence, this disagreement fails to warrant this Court's certiorari review. This Court has repeatedly stated that, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925) and *Texas v. Mead*, 465 U.S. 1041 (1984).

[15] *See Nike, Inc. v. Kasky*, 539 U.S. 654, 663 (2003) ("the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. (citations omitted).")

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari.

Respectfully submitted,

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